JAN 4 1952
CHARLES ELMORE CROPLEY
CLERK

342 C
20

IN THE

Supreme Court of the United States

GEN-

October Term, 1951

No. 512

NICKULUS A. GENTILA, By and through his mother and next friend, Jean Gentila, *Petitioner*,

v.

FRANK PACE, JR., Secretary of the Army, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT THEREOF

CORNELIUS H. DOHERTY
1010 Vermont Avenue, N. W.
Washington, D. C.
Attorney for Petitioner

WILSON - EPES PRINTING CO. - RE 6003 - WASHINGTON 1, D. C.

INDEX

PAGE

Petition 1

Summary Statement of Matter Involved 2

The Basis of the Court's Jurisdiction 5

Statutes Involved 5

Questions Presented 8

Reasons Relied Upon for the Allowance of the Writ 9

Brief in Support of Petition 11

Opinion of the Court Below 11

Specifications of Errors 11

Argument 12

The Allegations in the Amended Complaint Were Statements of Fact and Admitted by the Motion to Dismiss 20

The United States District Courts Have Inherent Authority to Review the Action of Administrative Agencies or Boards 22

Conclusion 27

Statutes

Title 5, Chapter 19, Section 1009, Paragraphs (a) (c) and (e), U. S. C. A. 5

Title 28, Rule 8 (a) (e) (1) and (f), Federal Rules of Civil Procedure 8

Title 38, Section 693h, U. S. C. A. 6

Cases Cited

Aircraft & Diesel Equipment Corporation v. Hirsch, 331 U. S. 752, 67 Supreme Court Rep. 1493 24

Crowell v. Benson, 285 U. S. 22, 52 Supreme Court Rep. 285 23

Dorsey v. Kingsland, 84 U. S. App. D. C. 264, 173 Fed. (2d) 405 ..... 9, 16, 18

PAGE

Estep v. United States, 327 U. S. 114, 66 Supreme Court Rep. 423 ..... 9, 13
Fleming v. Moberly Milk Products Co., 82 U. S. App. D. C., 16, 160 Fed. (2d) 259 9
Gusik v. Schilder, 340 U. S. 128, 71 Supreme Court Rep. 149 ..... 9, 15
Kristensen v. McGrath, 179 Fed. (2d) 796 ..... 9, 18
Lamb v. Patterson, 81 U. S. App. D. C. 43, 154 Fed. (2d) 319 ..... 9, 24
Morgan v. United States, 304 U. S. 1, 58 Supreme Court Rep. 773 16
National Labor Relations Board v. Minnesota Mining and Manufacturing Co., Eighth Circuit, 179 Fed. (2d) 323 10
Patterson v. Lamb, 329 U. S. 539, 67 Supreme Court Rep. 448 25
Podovinnikoff v. Miller, Third Circuit, 179 Fed. (2d) 937 10
St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 56 Supreme Court Rep. 720 15
United States ex rel Trinler v. Carusi, Third Circuit, 166 Fed. (2d) 457 ..... 10, 18
Universal Camera Corporation v. National Labor Relations Board, 340 U. S. 474, 71 Supreme Court Rep. 456 ..... 9, 14
Willapoint Oysters, Inc. v. Ewing, Ninth Circuit, 174 Fed. (2d) 676 ..... 10, 19
Wong Yang Sung v. McGrath, 339 U. S. 333, 70 Supreme Court Rep. 445 9

In The

Supreme Court of the United States

October Term, 1951

No. .....

Nickulus A. Gentila, By and through his mother and next friend, Jean Gentila, *Petitioner,*

v.

Frank Pace, Jr., Secretary of the Army, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTICT OF COLUMBIA CIRCUIT

The petition of Nickulus A. Gentila, by and through his mother and next friend, Jean Gentila, for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit entered on the 23rd day of November, 1951, affirming a judgment of the United States District Court for the District of Columbia dismissing petitioner's amended complaint for a mandatory injunction, respectfully shows:

SUMMARY STATEMENT OF MATTER INVOLVED

Your petitioner, on the 11th day of January, 1950, filed his amended complaint alleging that he was inducted into the Army of the United States on May 7, 1942, and that between his induction and September 7, 1943, he performed the duties required of him and that his recorded efficiency rating was at all times either excellent or very good.

That on the 7th day of September, 1943, petitioner's Army record indicates that he went absent without leave and that he voluntarily returned to duty on September 10, 1944, and that on November 29, 1944, he was discharged by reason of desertion, Section II AR 615-366, and given a discharge under dishonorable conditions, the record indicating a mental condition on the part of petitioner; that petitioner was not given a trial for the offense of desertion and was discharged without an opportunity to defend himself nor was he allowed counsel to advise him of his rights.

Petitioner further alleged in his complaint that at the time he went absent without leave on September 7, 1943, and at the time of his discharge on November 29, 1944, he was suffering from schizophrania, paranoid type, and incapable of having an intent to desert or of protecting his legal rights covering his discharge, and that the type of discharge given him was not in accordance with law nor in accordance with the Army Regulations then in force and effect covering the mode and type of discharge to be given persons in the Army of the United States.

On April 24, 1946, your petitioner was declared to be of unsound mind at Bellevue Hospital in New York City and committed to Kings Park State Hospital for the insane at Kings Park, Long Island, with a diagnosis of schizophrania, paranoid type, where he is now confined.

Petitioner applied to the Secretary of the Army's Discharge Review Board requesting that the type of discharge given him under dishonorable conditions be changed to an honorable discharge and restoring to him his veteran's benefits and his application was denied. An application was then made to Honorable Kenneth C. Royall, the then Secretary of the Army, to personally review the type of discharge granted and this application to review by the Secretary was denied.

Petitioner thereafter located Dr. Eugene Lee Wiemers, upon whose report he was discharged and whose report indicated a mental condition (R-11), and his deposition taken and a copy of the deposition, in which the doctor indicated a possibility of error in his diagnosis by reason of the medical history after petitioner's discharge, was filed with the respondent with a request that a rehearing be granted on the basis of the information contained in the deposition. The petition for a rehearing was denied.

Petitioner stated that the action of the Secretary of of the Army's Discharge Review Board was without evidence to support it and the action of the respondent in his Discharge Review Board was arbitrary and unjustified; that the action of the respondent in refusing to personally review the action of the Review Board was arbitrary and not in accordance with the Act of Congress creating such Board. Petitioner further alleged that the Discharge Review Board was not properly authorized and constituted in accordance with the Act of Congress authorizing such Board and that the discharge given him under dishonorable conditions was given without due process of law and an infringement of his rights under the Constitution (R-15).

The prayers of the complaint were that the respondent be required and directed to cancel the dis-

charge given petitioner on November 29, 1944, and that the respondent be required to issue to petitioner a medical discharge or a discharge under honorable conditions and that his record in the Army be amended to accord with the findings of the Court covering the insanity of petitioner.

A motion to dismiss the amended complaint was filed on the ground that the Court lacked jurisdiction to hear and consider the facts set forth in the complaint and that the respondent had acted in the proper exercise of discretion committed to him by the statute (R-5-6).

The matter was presented to John H. Sullivan, Commissioner of Veterans' cases for his report and recommendation. The Commissioner filed his report and recommended the denial of the motion to dismiss with the statement that it could be shown that the agency action was not supported by substantial evidence for a dishonorable discharge but that there was substantial evidence indicating that a mistake had been made which should be corrected upon the order of the District Court allowing a medical or an honorable discharge (R-8-24).

The matter came on for hearing on the motion to dismiss and the case was dismissed and an appeal was taken to the United States Court of Appeals for the District of Columbia Circuit (R-24-25).

The Court in its opinion (R-28) stated that the motion to dismiss should be regarded as admitting that petitioner was insane at the time of going absent without leave and not having the intent to desert. It further stated that the allegation of the complaint that the Board was not properly authorized and constituted was a conclusion of law and concluded (R-29) that the statement of the Act that the findings of the Board shall be

final subject to review by the Secretary precluded review by the Courts.

On November 23, 1951, the United States Court of Appeals for the District of Columbia Circuit affirmed the action of the United States District Court for the District of Columbia dismissing the amended complaint.

THE BASIS OF THE COURT'S JURISDICTION

The jurisdiction of this Court is based upon Section 240 (a) of the Judicial Code, as amended, Title 28 U. S. C. A., sec. 1254 (1).

The date of the judgment sought to be reviewed is November 23, 1951 (R-31).

STATUTES INVOLVED

Title 5, Chapter 19, Section 1009, Paragraphs (a) (c) and (e) of U. S. C. A.:

Rights of Review

"(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

Acts Reviewable

"(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the pur-

poses of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority."

Scope of Review

"(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. June 11, 1946, c. 324, § 10, 60 Stat. 243."

Title 38, Section 693h of U. S. C. A.:

"The Secretary of the Army and the Secretary of the Navy, after conference with the Administrator of Veterans' Affairs, are authorized and directed to establish in the Department of the Army and Navy Department, respectively, boards of review composed

of five members each, whose duties shall be to review, on their own motion or upon the request of a former officer or enlisted man or woman or, if deceased, by the surviving spouse, next of kin, or legal representative, the type and nature of his discharge or dismissal, except a discharge or dismissal by reason of the sentence of a general court martial. Such review shall be based upon all available records of the service department relating to the person requesting such review, and such other evidence as may be presented by such person. Witnesses shall be permitted to present testimony either in person or by affidavit and the person requesting review shall be allowed to appear before such board in person or by counsel: Provided, That the term 'counsel' as used in this section shall be construed to include, among others, accredited representatives of veterans' organizations recognized by the Veterans' Administration under section 101 of this title. Such board shall have authority, except in the case of a discharge or dismissal by reason of the sentence of a general court martial, to change, correct, or modify any discharge or dismissal, and to issue a new discharge in accord with the facts presented to the board. The Articles of War and the Articles for the Government of the Navy are amended to authorize the Secretary of the Army and the Secretary of the Navy to establish such boards of review, the findings thereof to be final subject only to review by the Secretary of the Army or the Secretary of the Navy, respectively: Provided, That no request for review by such board or a discharge or dismissal under the provisions of this section shall be valid unless filed within fifteen years after such discharge or dismissal or within fifteen years after June 22, 1944, whichever be the later: And provided further, That the authority conferred upon the Secretary of the Army and the Secretary of the Navy by this section shall vest in and be exercised by the Secretary of the Treasury, at such times as the Coast Guard is operating under the Treasury Department, with respect to the discharge or dismissal of former personnel of the Coast Guard, and

that the findings of boards established pursuant to such authority shall be final subject only to review by the Secretary of the Treasury. June 22, 1944, c. 268, Title I, § 301, 58 Stat. 286, as amended Aug. 8, 1946, c. 882, 60 Stat. 932; July 26, 1947, c. 343, Title II, § 205 (a), 61 Stat. 501."

TITLE 28, RULE 8 (a) (e) (1) AND (f) OF THE FEDERAL RULES OF CIVIL PROCEDURE

"Rule 8. General Rules of Pleading

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded."

"(e) Pleading to be Concise and Direct: Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required."

"(f) Construction of Pleadings.
All pleadings shall be so construed as to do substantial justice."

QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the District of Columbia Circuit correctly interpret the New Administrative Procedure Act?

2. Did the United States Court of Appeals for the District of Columbia Circuit clearly interpret the inten-

tion of Congress as set forth in the Act creating the Secretary of the Army's Discharge Review Board?

3. Was the United States Court of Appeals for the District of Columbia Circuit in error in holding that certain allegations of the complaint were conclusions of law and not admitted by the motion?

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

1. The decision of the United States Court of Appeals for the District of Columbia Circuit in this case is in conflict with the applicable decisions of this Court in

Estep v. *United States*, 327 U. S. 114, 66 Supreme Court Rep. 423
Wong Yang Sung v. *McGrath*, 339 U. S. 333, 70 Supreme Court Rep. 445
Gusik v. *Schilder*, 340 U. S. 128, 71 Supreme Court Rep. 149
Universal Camera Corporation v. *National Labor Relations Board*, 340 U. S. 474, 71 Supreme Court Rep. 456

The decision in this case is in direct conflict with the decisions of the United States Court of Appeals for the District of Columbia Circuit:

Kristensen v. *McGrath*, 179 Fed. (2d) 796
Lamb v. *Patterson*, 81 U. S. App. D. C. 43, 154 Fed. (2d) 319
Fleming v. *Moberly Milk Products Co.*, 82 U. S. App. D. C. 16, 160 Fed. (2d) 259
Dorsey v. *Kingsland*, 84 U. S. App. D. C. 264, 173 Fed. (2d) 405

The decision of the United States Court of Appeals for the District of Columbia Circuit is in conflict with the various Circuit Courts of Appeals in the following decisions:

United States ex rel Trinler v. *Carusi*, Third Circuit, 166 Fed. (2d) 457

Podovinnikoff v. *Miller, Third Circuit*, 179 Fed. (2d) 937

National Labor Relations Board v. *Minnesota Mining and Manufacturing Co.*, Eighth Circuit, 179 Fed. (2d) 323

Willapoint Oysters, Inc. v. *Ewing*, Ninth Circuit, 174 Fed. Rep. (2d) 676

2. The decisions of the Supreme Court of the United States, United States Court of Appeals for the District of Columbia Circuit, and the decisions of the other United States Circuit Courts of Appeals sustain the petitioner's right to a review under the Constitution of the United States and under the New Administrative Procedure Act.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia should be granted.

CORNELIUS H. DOHERTY
1010 Vermont Avenue, N. W.
Washington, D. C.
Attorney for Petitioner

IN THE

Supreme Court of the United States

October Term, 1951

No.

NICKULUS A. GENTILA, By and through his mother and next friend, Jean Gentila, *Petitioner*,

v.

FRANK PACE, JR., Secretary of the Army, *Respondent*.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the District of Columbia has not been officially reported at the time this is written, but is printed in the record (R-27-30).

SPECIFICATION OF ERRORS

1. The United States Court of Appeals for the District of Columbia Circuit erred in holding that the action of the respondent was final and not reviewable under the New Administrative Procedure Act.

2. The United States Court of Appeals for the District of Columbia Circuit erred in holding that certain allegations of the amended complaint were conclusions of law and not admitted by the motion.

3. The United States Court of Appeals for the District of Columbia Circuit erred in refusing to hold that the United States District Court for the District of Columbia has inherent authority to review the action of administrative agencies and boards.

ARGUMENT

The action of the respondent was reviewable under the New Administrative Act. The United States Court of Appeals in its opinion (R-28) refers to Army Regulations which authorize the discharge of an enlisted man without trial because of desertion and physical unfitness, but the regulation does not apply when the soldier does not possess sufficient mentality to distinguish between right and wrong and is consequently incapable of forming the intent which is an essential element of the offense of desertion.

The allegations of the amended complaint were that the petitioner was insane at the time he went A. W. O. L. and when a discharge was tendered to him and that the type of discharge given him was not in accordance with law and the Army Regulations then in force and effect. The complaint further alleged that the action of the Secretary of the Discharge Review Board was without evidence to support it. These facts were admitted by the motion but the Court held that even in the face of these facts the Courts were powerless to intervene for the reason that the Board's action was final and not subject to review by the Courts.

The New Administrative Procedure Act, which has been referred to by the petitioner under "Statutes Involved" and which went into effect on June 11, 1946, states that except so far as statutes preclude judicial review, or agency action is by law committed to agency discretion, any person suffering legal wrong or adversely affected or aggrieved by such action shall be entitled to judicial review.

Under paragraph "(e)" of the Act so far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall * * * (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case * * *.

Title 38, Section 693h of United States Code Annotated authorizing the establishment of the Secretary of the Army's Discharge Review Board is silent insofar as a reference to judicial review of the action of the Board, but this was covered by this Court in its decision in the case of *Estep* v. *United States*, 327 U. S. 114, 66 Supreme Court Rep. 423, in which the Court, at page 119, makes the following statement:

> "Thus we start with a statute which makes no provision for judicial review of the actions of the local boards or the appeal agencies. That alone, of course, is not decisive. For the silence of Congress as to judicial review is not necessarily to be construed as a denial of the power of the federal courts to grant relief in the exercise of the general jurisdiction which Congress has conferred upon them."

The scope of the review allowed by the New Administrative Procedure Act was referred to in the case of *Universal Camera Corporation* v. *National Labor Relations Board,* 340 U. S. 474, 71 Supreme Court Reporter 456, this Court, after going into the Act very thoroughly, made the following statement at page 487:

> "From the legislative story we have summarized, two concrete conclusions do emerge. One is the identity of aim of the Administrative Procedure Act and the Taft-Hartley Act regarding the proof with which the Labor Board must support a decision. The other is that now Congress has left no room for doubt as to the kind of scrutiny which a court of appeals must give the record before the Board to satisfy itself that the Board's order rests on adequate proof."

This Court again, at page 489, made the following statement:

> "The adoption in these statutes of the judicially-constructed 'substantial evidence' test was a response to pressures for stricter and more uniform practice, not a reflection of approval of all existing practices."

And at page 490 concluded as follows:

> "We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds."

The Court of Appeals indicated (R-29) that because the statute expressly made the findings of the Board final, subject only to review by the Secretary, that it was the intention of Congress that the action should

be final and not subject to any review by the Courts, but this Court, in *Gusik* v. *Schilder*, 340 U. S. 128, 71 Supreme Court Rep. 149, at page 132, made the following statement:

> "We read the finality clause of Article 53 as doing no more than describing the terminal point for proceedings within the court-martial system. If Congress had intended to deprive the civil courts of their habeas corpus jurisdiction, which has been exercised from the beginning, the break with history would have been so marked that we believe the purpose would have been made plain and unmistakable."

In the case of *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 56 Supreme Court Rep. 720, the Supreme Court, at page 51, stated the following:

> "* * * When the Legislature acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression of these limits of power. The Legislature cannot preclude that scrutiny or determination by any declaration or legislative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained. Nor can the Legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within that limitation." * * * But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded. It is said that we can retain judicial authority to examine the weight of evidence when the question concerns the right of

> personal liberty. But, if this be so, it is not because we are privileged to perform our judicial duty in that case and for reasons of convenience to disregard it in others. The principle applies when rights either of person or of property are protected by constitutional restrictions. Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority. * * *"

If the Board's action in denying the petitioner a discharge under honorable conditions was supported by substantial evidence and if the Court would so find on a review, then no one would be injured and the petitioner would have been accorded the rights due him as a citizen and soldier of the United States, and in the case of *Morgan* v. *United States,* 304 U. S. 1, 58 Supreme Court Reporter 773, the Court, at page 22, made the following statement:

> "The maintenance of proper standards on the part of administrative agencies in the performance of their quasijudicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."

The authority of the Courts under the New Administrative Procedure Act was before the United States Court of Appeals for the District of Columbia Circuit in the case of *Dorsey* v. *Kingsland,* 84 U. S. App. D. C. 264, 173 Fed. (2d) 405, and the Court, at page 269, made the following statement:

"To be sure, at the time of the enactment of Section 11 in 1922, the doctrine of 'administrative finality' (or administrative infallibility) had never been heard of. But by 1946 this theory was thoroughly familiar to lawyers and Congress proceeded to legislate upon it, among other things, by passing the Administrative Procedure Act of 1946, 5. U. S. C. A. § 1001 et seq. (1946). Under Section 10(e) of the Administrative Procedure Act, it became the right and indeed the duty of the court upon proper application of an aggrieved party to judicially review the action of any agency, and it may review the whole record of the proceedings had below for the purpose of ascertaining any prejudicial error. Under these provisions the burden of proof must be upon the proponent of the rule to show cause.

The whole legislative history of the Administrative Procedure Act and more particularly the luminous discussion on the floor of the Senate between three of the leading lawyers of the Senate, Senators George, McCarran and Ferguson conclusively show that it was the inflexible intention of Congress to (in the language of Chairman McCarran of the Senate Judiciary Committee): 'establish a guide for administrative groups so that they would apply the rule in such a way that there would be substantial probative evidence behind their findings, and so that they could say, We are not afraid to have our findings reviewed by a court' * * *we are saying that there must be probative evidence of a substantive nature, and that even though the commission or bureau may take hearsay evidence in its hearings, it must have some probative evidence to sustain its finding.' (Italics supplied.)

In this discussion it was repeatedly agreed between Senators McCarran, George and Ferguson, all eminent former jurists, that the Act was intended to change and did change the construction put upon various acts of Congress by some Courts that any evidence would be sufficient to sustain the verdict or judgment of an administrative agency and to substitute therefor the doctrine that substantial probative evidence must be required."

It is true that certiorari was granted in the case of *Dorsey* v. *Kingsland*, *supra*, and that this Court in 338 U. S. 318, 70 Supreme Court Rep. 123, reversed the action of the United States Court of Appeals for the District of Columbia Circuit, but it did so on other grounds without reversing as to the matter above stated.

The United States Court of Appeals for the District of Columbia Circuit, in the case of *Kristensen* v. *McGrath*, 179 Fed. (2d) 796, in referring to the New Administrative Procedure Act, made the following statement at page 800:

> "Our examination of the legislative history brings us to the same conclusion as that reached by the Third Circuit in the Trinler case, supra. We hold that the Administrative Procedure Act's judicial review section was not intended to perpetuate pre-existing rigidities in the use of extraordinary legal remedies but rather to simplify and make more flexible the avenues to judicial relief. Thus viewed, appellant's suit for a declaratory judgment is well taken if he can prove the existence of a justiciable case or controversy."

The Court's reference to the *Trinler* case was the case of United States ex rel *Trinler* v. *Carusi*, 166 Fed. (2d) 457, in which the Third Circuit went very fully into the rights of persons aggrieved by agency action. The statute, under which Trinler was being deported, stated that the decision of the Attorney General shall be final. The Commissioner relied under the first exception of the Administrative Procedure Act that it precludes judicial review because it had stated that the decision of the Attorney General shall be final, and the Court, at page 461, made the following statement:

> "Our conclusion is that the case does not fall within the exception. Therefore the judicial review provisions found in Section 10 of the Act are applicable. We are impressed by the fact that in spite of the basic statute's wording habeas corpus proceed-

> ings have always been available. Since they have been available the situation cannot be one where judicial review in the past has been precluded. In this we are supported, we think, by discussion found in the legislative history of the Act. In that discussion it was pointed out that statutes which preclude judicial review are unusual. Congressman Walter pointed out to the House of Representatives that this clause was simply put in to provide for the unusual situation where judicial review of administrative action was actually precluded."

It is true that the appeal in the *Trinler* case was dismissed because of the abatement of the action, 168 Fed. (2d) 1014, but the decision stands and has been referred to in numerous cases, including the cases in our Court of Appeals for the District of Columbia.

In the case of *Willapoint Oysters* v. *Ewing*, 174 Fed. (2d) 676, the Court said that we do not view this particular directive, of Section 1009 (e), as one requiring us to go beyond the limits now generally recognized under the so-called "Substantial evidence" rule, or to weigh evidence and substitute our own judgment for that of the administrative agency. We think that we conform to it when we consider the evidence on both sides in order to determine whether it appears that the evidence in support of the administrative conclusion can fairly be said to be substantial in the face of opposing evidence.

It is apparent from the foregoing cases that it was the intention of Congress in the enactment of the new Administrative Procedure Act to require the Courts to be more alert in their review of the actions of administrative boards and agencies and to ascertain whether or not the final action of such board is supported by substantial evidence. It is true that a number of cases indicate clearly that it was the duty of the Courts, even without the Act, to ascertain whether or not the action

of the administrative agency or board is in compliance with the Congressional Act authorizing such board or agency, whether it is in compliance with the Cunstitution of the United States and whether or not its action was supported by substantial evidence.

THE ALLEGATIONS IN THE AMENDED COMPLAINT WERE STATEMENTS OF FACT AND ADMITTED BY THE MOTION TO DISMISS

The first sentence of the Act creating the Secretary of the Army's Discharge Review Board states the following:

> "The Secretary of the Army and the Secretary of the Navy, after conference with the Administrator of Veterans' Affairs, are authorized and directed to establish in the Department of the Army and Navy Department, respectively, boards of review composed of five members each, whose duties shall be to review, * * *"

In the amended complaint your petitioner alleged, in paragraph 18, (R-5) the following:

> "The plaintiff avers that the Discharge Review Board was not properly authorized and constituted in accordance with the Act of Congress authorizing such Board of Review."

The Court of Appeals in its opinion (R-28) stated that this allegation was a conclusion of law unsupported by any allegation of fact, and it is submitted that this statement contained the ultimate fact which was to be proved by the petitioner and that was that the Board was not properly authorized and composed in accordance with the foregoing sentence of the Act.

It is true that prior to the Federal Rules of Civil Procedure, common law pleading would require of the pleader to set forth in more detail the facts to be proven

but the new rules clearly indicate that no evidentiary matter should be pleaded. All that is necessary is that the opposing party have sufficient information upon which to base a responsive pleading.

In the commentaries following Rule 8 of the Federal Rules of Civil Procedure is the following:

"1. Sufficiency of pleadings

'While a litigant under the new Rules is no longer to be hampered in the introduction of evidence or limited in his recovery by the theory adopted in his pleading (as under the old 'theory of the pleadings' doctrine), yet, in testing the sufficiency of a pleading by a motion to dismiss, the requirement of clarity in Rule 8(e) (1) should be applied to require that the pleading truly reflect the basis upon which the plaintiff believes he should recover.' 1941, 4 Cal. S. B. J. 121.

'The real test of a good pleading under the new rules is not, * * * whether the allegations would be deemed good at common law. The test is whether information is given sufficient to enable the party to plead and to prepare for trial. A legal conclusion may serve the purpose of pleading as well as anything else if it gives the proper information. If the party wants more he may ask for more details in regard to the particular matter that is stated too generally. Alternative and hypothetical statements of claims or defenses are permitted. This is somewhat shocking to the common law pleader. As a matter of fact an alternative or hypothetical position is often the true one, but the rule of common-law pleadings compelled the pleader to pretend the contrary.' 45 W. Va. L. Q. 5.

'When objection is made to a pleading, the issue should not be whether there is a technical violation of a rule, but whether correction will advance the cause materially.' 25 A. B. A. J. 22."

"2. Clarification of issues

* * * 'The new Federal Rules of Civil Procedure do not proceed upon the assumption that the func-

> tion of pleading is to prepare the case for trial. It is recognized that the 'issue-pleading' of the common law does not sift out the real issues, the 'fact-pleading' of the codes the real facts. The generality of allegation contemplated by the Rules indicates the influence of the newer concept of 'notice pleading'; the object of the complaint is to indicate to the defendant which grievance is being pressed; the object of the answer is to indicate to the plaintiff which defenses are being relied upon. What have been thought to be the objects of pleading—the narrowing of issues, the revelation of facts—will be served by several devices more precisely adapted to their fulfillment: the familiar motions for certainty, the new pretrial hearing, and the not new but completely renovated procedure for depositions and discovery.' 38 Colum. L. Rev. 1179."

There is nothing in the record which would indicate that the respondent did not understand what the petitioner expected to prove nor was there anything in the report of the Commissioner of Veterans' Affairs which would indicate that he was unable to understand the intent and meaning of each and every allegation of the amended complaint, and it is submitted that each and every allegation was a statement of the ultimate facts to be proved by the petitioner and that these allegations were admitted by the motion to dismiss.

THE UNITED STATES DISTRICT COURTS HAVE INHERENT AUTHORITY TO REVIEW THE ACTION OF ADMINISTRATIVE AGENCIES OR BOARDS

Even if Congress had included in the Act creating the Secretary of the Army's Discharge Review Board the provision that the action of the Secretary would be final and not subject to judicial review, the Courts would have authority to review the action of the Secretary as to whether or not he had complied with the directive of

Congress and also as to whether Congress had the authority to give such power to the Secretary.

It must be borne in mind that the New Administrative Procedure Act was effective as of June 11, 1946, and that the Act creating the Discharge Review Board was amended as of August 8, 1946 and July 26, 1947, so that if Congress had intended that the action of the Secretary or his Board was not to be subject to review in accordance with the New Administrative Procedure Act it had ample opportunity to so state in the amendments to the Act.

In the case of *Crowell* v. *Benson*, 285 U. S. 22, 52 Supreme Court Rep. 285, this Court, at page 57, made the following statement:

> "The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the executive department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law."

And again at page 58 made the following statement:

> "Even where the subject lies within the general authority of the Congress, the propriety of a challenge by judicial proceedings of the determinations of fact deemed to be jurisdictional, as underlying the authority of executive officers, has been recognized. When proceedings are taken against a person under the military law, and enlistment is denied,

the issue has been tried and determined de novo upon habeas corpus."

In the case of *Aircraft & Diesel Equipment Corporation* v. *Hirsch,* 331 U. S. 752, 67 Supreme Court Rep. 1493, it was clearly indicated that while Congress intended to endow the Tax Court's decisions with a very large degree of finality and definitely stating that its final determination should not be reviewed or redetermined by any Court or agency that it was still subject to review by the Courts. It is true, as stated at page 771 of the opinion, that the Court was not forced in that case to decide whether Congress intended to give the Tax Court the last word upon all questions of fact and law, or whether it could do so if that were surely its purpose, but the context of the entire opinion indicated that even in such a case it would be proper for the Court to intervene.

Prior to the New Administrative Procedure Act your petitioner would have been permitted to request the Court to review the action of the Secretary of the Army to ascertain whether or not he had received a discharge in accordance with the Army Regulations.

In the case of *Lamb* v. *Patterson,* 154 Fed. (2d) 319, 81 U. S. App. D. C. 43, decided March 25, 1946, by the United States Court of Appeals for the District of Columbia, the appellant had filed a complaint to require the Secretary to give him an honorable discharge. The Secretary had moved to dismiss on the ground that the type of discharge to be given was within the discretion of the Secretary and not subject to review by the Courts. That was, in substance, the grounds upon which the respondent moved to dismiss in this case (R-5-6), and the United States Court of Appeals for the District of Columbia, after discussing the facts, at page 323, stated the following:

"It must be conceded that the determination originally of the several forms of certificates of discharge was a proper exercise of the executive authority of the Secretary; but, having exercised that authority and having defined the three types of certificates to be issued, and having by regulation established standards to govern the selection of the proper form to be issued to each discharged soldier, the executive authority of the Secretary had been fully exercised, and the duty of the army officer at Camp Dodge in issuing a certificate of discharge to the appellant was simply ministerial, as though the regulation had been a statute. That officer did not have, and indeed the Secretary himself would not have had, the right arbitrarily to issue to Lamb any form of discharge certificate other than that which was appropriate to his status according to the standards set up in paragraph 150 of the Army Regulations. True it is that the Secretary again could exercise his executive authority to provide for additional and different forms of discharge, as he did by the regulations of January 12, 1918, and again on December 4, 1918; but, once standards are erected by regulation, it is merely ministerial to observe them. Consequently, it is incorrect to say, as the appellees do, that whether the appellant is entitled to a certificate of honorable discharge rests in the sound discretion of the Secretary of War."

It is true that certiorari was granted in this case to the United States Court of Appeals for the District of Columbia and reversed in *Patterson* v. *Lamb,* 329 U. S. 539, 67 Supreme Court Rep. 448, but on different grounds and nothing was said by this Court which would detract from the above statement taken from the opinion of the United States Court of Appeals for the District of Columbia.

The allegation of the complaint was that the petitioner was insane at the time he went A. W. O. L. and at the time the discharge was tendered to him and not in accordance with the Army Regulations then in force and

effect, and the United States Court of Appeals, in its opinion, indicates that if the petitioner were insane that he could not be given a discharge under dishonorable conditions.

The Army Record of your petitioner was before the Commissioner of Veterans' Affairs and his reference to the statement of the doctor recommending his discharge (R-8) indicated petitioner to be a constitutional psychopath with severe emotional instability and a prognosis for adjustment in Army or civilian life rated as poor, and further that in the Army he had been transferred to several organizations and never adjusting to regimentation. The record further indicated that the soldier's efficiency rating at all times was either excellent or very good. (R-11). The real fact to be finally considered was whether your petitioner was a psychopath as stated in the report or psychotic as the record now indicates.

Most psychiatrists agree that schizophrenia, paranoid type, is a progressive disease and that there are incipient stages of the disease which apparently leave the patient mentally alert and the Commissioner in his opinion (R-14) refers to the deposition of Dr. Wiemers that now knowing of the history subsequent to his discharge indicated that it might possibly and most probably would go with a psychotic process.

The Commissioner further in his opinion (R-23) stated that the weight of the evidence can properly be shown to prove that the agency action was not supported by substantial evidence for a dishonorable discharge and that substantial evidence is present warranting a medical discharge or an honorable discharge and that a mistake had been made which should be corrected by the Court.

CONCLUSION

The record herein clearly indicates that your petitioner has been denied due process of law by the action of the Secretary of the Army in giving him a discharge under dishonorable conditions upon the grounds of desertion and physical unfitness at a time when he was insane and incapable of protecting his own rights and that the type of discharge given to your petitioner was not in accord with the regulations in force and effect at the time the discharge was tendered to him, and that the Secretary has no discretion after the regulations have been issued by him but to comply with the spirit and wording of these regulations.

The record discloses that your petitioner has exhausted all the administrative remedies open to him to correct the type of discharge tendered to him and that the Secretary, who is the final authority in such matters, has refused to review the type of discharge tendered to petitioner.

It is respectfully submitted that the decision of the United States Court of Appeals for the District of Columbia Circuit in this case is in conflict not only with the decisions of this Court but with the decisions of its own Court and of numerous other United States Circuit Courts of Appeals where these questions have arisen; that the questions presented in this petition are of extreme importance and wide application to all matters heard by administrative agencies or boards created by Congressional Acts and that the writ of certiorari should be granted in this case in order that the questions presented herein may be clarified and settled by this Honorable Court.

CORNELIUS H. DOHERTY
1010 Vermont Avenue, N. W.
Washington, D. C.
Attorney for Petitioner

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and Army Regulations Involved	2
Statement	2
Argument	5
Conclusion	14
Appendix	15

CITATIONS

Cases:	
Blackmar v *Guerre, et al.*, No. 361, this term	7
Creary v. *Weeks*, 259 U. S. 336	5, 7
Decatur v. *Paulding*, 14 Pet. 497	5
Estep v. *United States*, 327 U. S. 114	9
French v. *Weeks*, 259 U. S. 326	7
Gusik v. *Schilder*, 340 U. S. 128	9, 10
Inland Steel Co. v. *National Labor Relations Board*, 105 F. 2d 246	14
Kristensen v. *McGrath*, 179 F. 2d 796, affirmed, 340 U. S. 162	10
Ludecke v. *Watkins*, 335 U. S. 160	9
Patterson v. *Lamb*, 329 U. S. 539	3, 7
Reaves v. *Ainsworth*, 219 U. S. 296	5, 7, 10
Reid v. *United States*, 161 Fed. 469, writ of error dismissed, 211 U. S. 529	5
Robertson v. *Chambers*, 341 U. S. 37	6, 11
Silberschein v. *United States*, 266 U. S. 221	14
Switchmen's Union v. *National Mediation Board*, 320 U. S. 297	8, 10
United States v. *Chemical Foundation*, 272 U. S. 1	14
United States ex rel. Trinler v. *Carusi*, 166 F. 2d 457, vacated, 168 F. 2d 1014	10
Statutes, Article of War, and regulations:	
Act of October 25, 1951, ch. 588, P. L. 220, 82d Cong., 1st Sess.	11
Administrative Procedure Act (60 Stat. 243, 5 U. S. C. 1009):	
Section 10	5, 7, 8, 12, 16
Legislative Reorganization Act of 1946 (60 Stat. 812):	
Section 131	10, 11
Section 207 (5 U. S. C. 191a)	10, 11

Statutes, Article of War, and regulations—Continued — Page

Servicemen's Readjustment Act of 1944 (58 Stat. 284, as amended by the Acts of Aug. 8, 1946, 60 Stat. 932, and July 26, 1947, Sec. 205, 61 Stat. 501, 38 U. S. C. 693, *et seq.*):
- Section 300 — 4
- Section 301 — 4, 5, 6, 8, 9, 12, 15
- Section 302 — 9

New York Mental Hygiene Law, Section 74 — 4
108th Article of War (10 U. S. C. 1580) — 17
Army Regulations 615–366, dated 10/21/44 — 2–3, 17

Miscellaneous:
- 90 Cong. Rec. 3076–3077 — 9
- 90 Cong. Rec. 4538–4541 — 9
- Federal Rules of Civil Procedure, Rule 12 (b) — 12
- H. R. 1203, 79th Cong., 1st Sess — 8
- Manual for Courts-Martial, U. S. Army (1949), p. 199 — 6
- 40 Op. A. G. 504, 508 — 11
- 41 Op. A. G. No. 1, p. 2 — 11
- 41 Op. A. G. No. 8, p. 4 — 11
- Rules of the United States District Court for the District of Columbia, Rule 29 — 12
- S. 7, 79th Cong., 1st Sess — 8
- Senate Judiciary Committee Print, June 1945, Comment on Section 10 (e), Senate Document 248, 79th Cong., 2d Sess., p. 39 — 7
- S. Doc. 248, 79th Cong., 2d Sess.:
  - Pages 83–84 — 7
  - Pages 229–230 — 7, 8
  - Page 311 — 7
  - Page 413 — 8
  - Page 415 — 7
- S. Rep. 1400, 79th Cong., 2d Sess., p. 7 — 11

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 512

NICKULUS A. GENTILA, BY AND THROUGH HIS MOTHER AND NEXT FRIEND, JEAN GENTILA, PETITIONER

v.

FRANK PACE, SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The United States District Court for the District of Columbia wrote no opinion (R. 24A). The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 27–30) is not yet reported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on November 23, 1951 (R. 31). The

petition for a writ of certiorari was filed on January 4, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

In 1944 petitioner was discharged without honor from the Army of the United States for misconduct. He petitioned an Army Discharge Review Board established pursuant to Section 301 of the Servicemen's Readjustment Act of 1944 that he be given an honorable discharge in place of the discharge he had received. The Board declined to grant the relief requested. The question presented is whether the Administrative Procedure Act authorizes judicial review of the Discharge Review Board's decision.

STATUTES AND ARMY REGULATIONS INVOLVED

The pertinent provisions of the statutes and Army regulations involved are set forth in the Appendix, *infra,* pp. 15–17.

STATEMENT

Petitioner was inducted into the Army on May 7, 1942 (R. 2A). He absented himself without authority on September 7, 1943 for about a year and voluntarily returned to Army control on September 10, 1944 (R. 3A). The Army thereupon instituted proceedings to discharge him for misconduct under Army Regulations (A. R.

615–366 (*infra*, p. 17))[1] which permit the discharge without a trial of an absentee or deserter who is found physically unfit for service. Physical unfitness under this provision includes "those cases of mental deficiency and constitutional psychopathy that obviously cannot be adapted to military service," but a serviceman may not be discharged under this regulation if he does not "possess sufficient mentality to distinguish between right and wrong and is consequently incapable of forming the intent" to desert.

Petitioner's medical examination resulted in a diagnosis that he was a constitutional psychopath with a severe emotional instability, but that he was not psychotic, that he knew the difference between right and wrong, and that he was capable of forming an intent to desert (R. 11A–12A).

On November 29, 1944 petitioner was discharged without honor (R. 3A).[2] About 1½ years later, in April 1946, petitioner was adjudged mentally ill and a proper subject for treatment and custody in an institution pursuant

---

[1] The authority to issue this regulation is based on the 108th Article of War (10 U. S. C. 1580); cf. *Patterson* v. *Lamb*, 329 U. S. 539, 542.

[2] The complaint (Paragraph 8) alleges that petitioner was given a discharge under dishonorable conditions (R. 3A). A. R. 615–366 (Par. 10), *infra*, p. 17, provides, however, that (blue) W. D. AGO Form 56 will be used for all discharges under the provisions of this section. This is a discharge without honor but not a dishonorable discharge.

to Section 74 of the New York Mental Hygiene Law (cf. R. 3A).

In 1947 petitioner filed an application with the Discharge Review Board established pursuant to Section 301 of the Servicemen's Readjustment Act of 1944 (58 Stat. 286, 38 U. S. C. 693h, *infra,* pp. 15–16), requesting that he be issued an honorable discharge restoring him to veteran's benefits (cf. Servicemen's Readjustment Act of 1944, Section 300, 38 U. S. C. 693g). This application was denied. (R. 3A–4A).

In the following year, petitioner submitted a petition for rehearing which was granted; but after the new hearing had been held the application was again denied. An appeal to the Secretary of the Army was also denied (R. 4A).

In September 1949 the deposition of the Army doctor who had examined him at the time of his discharge was taken in which the doctor "indicated a possibility of error in his former diagnosis" (R. 4A; cf. 14A). On the basis of this deposition petitioner sought a second rehearing which, however, was denied on November 8, 1949 (R. 4A).

Petitioner filed his "Amended Complaint for Mandatory Injunction" on January 11, 1950 (R. 2A). The motion of the Secretary of the Army to dismiss the complaint (R. 5A) was referred to the Veterans' Commissioner who filed a detailed report which petitioner has incorpo-

rated in the record in the court below and in this Court (R. 8A–24A; 32). The District Court dismissed the complaint without opinion (R. 24A); the Court of Appeals affirmed on the ground that the statute creating the Discharge Review Board precluded judicial review (R. 27–30).

ARGUMENT

The sole point raised in this petition is whether petitioner is entitled to a judicial review of the decision of the Discharge Review Board denying him an honorable discharge.[3] A Discharge Review Board established pursuant to Section 301 of the Servicemen's Readjustment Act of 1944 (*infra*, pp. 15–16) has authority to review the discharge of a serviceman (unless decreed by a general

[3] The complaint alleged two additional instances of agency action which petitioner sought to have reviewed; he evidently is no longer pressing them. They are the failure of respondent personally to review the action of the Discharge Review Board (par. 17, R. 4A), and the administrative discharge without honor itself (par. 19, R. 5A). These points are without merit. Section 301 of the Servicemen's Readjustment Act (*infra*, pp. 15–16) does not place a duty upon the Secretary of the Army to review the findings of the Discharge Review Board. His authority to do so is at best discretionary and, hence, his failure to act is not subject to judicial review. *Decatur* v. *Paulding*, 14 Pet. 497; Administrative Procedure Act, Section 10 (*infra*, pp. 16–17). The contention that administrative discharges from the Army constitute a denial of due process was rejected in *Reaves* v. *Ainsworth*, 219 U. S. 296, 304; *Creary* v. *Weeks*, 259 U. S. 336, 343–344; see also *Reid* v. *United States*, 161 Fed. 469 (S. D. N. Y.), writ of error dismissed, 211 U. S. 529.

court martial) on the basis of the available record of the service department and other evidence properly before it (cf. *Robertson* v. *Chambers,* 341 U. S. 37) and to issue a new discharge in accord with the facts presented. Section 301 provides that the findings of a Discharge Review Board shall be final, subject only to review by the Secretary of the service department involved. This finality provision, together with the nature, history, and background of the Review Board's work, show that judicial review is precluded.

Moreover, even if review were available, petitioner could not recover. He unquestionably absented himself from his post of duty in the Army without leave for more than a year (R. 3A). It is clear, therefore, that he was entitled to the administrative relief sought by him only if the facts presented to the Board showed that when he so absented himself in 1943 (i. e., 2½ years before he was committed as mentally ill), he did not possess sufficient mental capacity to distinguish between right and wrong and, consequently, was incapable of forming the intent to desert.[4] And there was substantial medical evidence before the Board that petitioner was not psychotic and that he knew the difference between right and wrong (R. 11A–12A, 27). It is plain, therefore, that the action of the Discharge Review Board in this case

[4] Protracted absence without leave, not satisfactorily explained, warrants the inference of an intent to desert. Manual for Courts-Martial, U. S. Army (1949), p. 199.

was not arbitrary. In the circumstances, the trial court was certainly without power to disturb the conclusions reached by that Board.

1. The court below properly held that the trial court had no jurisdiction to review the decision of the Discharge Review Board. It has been established in a long line of decisions that the courts will not review the action of military boards and tribunals with respect to the type of discharge issued to a member of the armed forces. *Reaves* v. *Ainsworth,* 219 U. S. 296, 306; *French* v. *Weeks,* 259 U. S. 326, 335–336; *Creary* v. *Weeks,* 259 U. S. 336, 344; cf. *Patterson* v. *Lamb,* 329 U. S. 539, 542. Petitioner apparently concedes that this was the law up to 1946, but claims that access to the courts has been opened to him by virtue of Section 10 of the Administrative Procedure Act (60 Stat. 243, 5 U. S. C. 1009, *infra,* pp. 16–17, hereinafter sometimes referred to as the Act). We submit that the Administrative Procedure Act does not have this effect.

As a general proposition, Section 10 of the Act did not make judicial review available where there had been none before. The "mischief" which this section was supposed to cure was the scope of judicial review, not its availability (Senate Judiciary Committee Print, June 1945, comment on Section 10 (e), Senate Document No. 248, 79th Cong., 2d Sess., p. 39; cf. pages 83–84, 229–30, 311, 415, to the effect the Act was not in-

986904—52——2

tended to interfere with the existing law granting or denying judicial review). See, generally, Brief for Respondents, *Blackmar* v. *Guerre, et al.*, No. 361, this term; at pp. 26–37.

Under Section 10 of the Administrative Procedure Act a person aggrieved by administrative action is entitled to judicial review, "except so far as statutes preclude" it. Section 301 of the Servicemen's Readjustment Act of 1944, *infra*, pp. 15–16, is a statute precluding judicial review within the meaning of Section 10. Section 301, which authorizes the establishment of Discharge Review Boards does not state in express terms that the decisions of such Boards shall be subject to judicial review. On the contrary, it states that the findings of those Boards shall be final and subject to review by the Secretary of the Army or the Navy as the case may be. Section 10 of the Administrative Procedure Act does not require that judicial review be *expressly* precluded.[5] Thus the question whether judicial review has been precluded is largely a matter of congressional intent, to be determined on the basis of the purposes of the legislation and the traditional

[5] The bill as originally introduced in Congress read "except so far as statutes *expressly* preclude judicial review" (S. 7. H. R. 1203, 79th Cong., 1st Sess.); the word *expressly* was eliminated in Committee. Moreover, the Attorney General's commentary to Congress on the Bill pointed out that this Court had repeatedly construed a statute, which did not preclude judicial review in express terms, as precluding it by implication. Sen. Doc. No. 248, 79th Cong., 2d Sess., pp. 229–230, 413.

availability *vel non* of judicial review in that particular legal sphere (cf. *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297, 306; *Ludecke* v. *Watkins,* 335 U. S. 160, 164–165; *Estep* v. *United States,* 327 U. S. 114, 120–124; *Gusik* v. *Schilder,* 340 U. S. 128, 132).

The purpose of Section 301 of the Servicemen's Readjustment Act was to create an administrative machinery within the service departments whereby servicemen could have their discharges reviewed without the necessity of recourse to special acts of Congress (90 Cong. Rec. 4538). The pertinent congressional debates in the Senate and in the House (90 Cong. Rec. 3076–3077 and 4538–4541) do not indicate any legislative purpose radically to depart from the existing law, which denied judicial review of the discharges, and to subject the courts of the District of Columbia to a flood of litigation in that field.[6]

[6] We have been advised by the Department of the Army that from the time of its organization in 1944 until December 31, 1950, the Army Discharge Review Board alone has handled 34,535 cases. In order to determine the amount of potential litigation which would be created by Secs. 301 and 302 of the Servicemen's Readjustment Act of 1944 if they provided for judicial review, it would be necessary to add to these 34,535 cases those passed upon by the Navy, Coast Guard, and Air Force Discharge Review Boards and those decided by the Disability Review Boards. Virtually all litigation to review the Board's decisions would have to be brought in the United States District Court for the District of Columbia. The resulting relative increase of its workload may be measured by the fact that during the last few years an average of 5,500 civil cases has been filed with that court per year.

This interpretation of Section 301 is supported by the finality clause providing that the findings of the Discharge Boards of Review shall "be final subject only to review by the Secretary of the Army * * *." It is true that a finality clause of this type does not by itself preclude the judicial review of such administrative decisions as traditionally have been reviewable.[7] On the other hand, in a field, as here, in which judicial review traditionally has been absent and where it would increase the work load of the courts by a substantial percentage the insertion of this clause constitutes an additional circumstance manifesting a congressional intent that disputes concerning discharges are to reach their terminal point within the service department and are not to be carried over into the courts. Cf. *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297, 305; *Reaves* v. *Ainsworth,* 219 U. S. 296, 306.

Moreover, contemporaneous evidence indicates that Congress itself did not believe that the Administrative Procedure Act had provided for judicial review of the decisions of the Discharge Review Boards. This appears from the insertion of Sections 131 and 207 into the Legislative Reorganization Act of 1946 (60 Stat. 812, 831, 837) which was passed less than 2 months after the approval of the Administrative Procedure Act.

---

[7] *Gusik* v. *Schilder,* 340 U. S. 128, 132–133; *Kristensen* v. *McGrath,* 179 F. 2d 796 (C. A. D. C.), affirmed, 340 U. S. 162; *United States ex rel. Trinler* v. *Carusi,* 166 F. 2d 457, vacated, 168 F. 2d 1014 (C. A. 3).

These two sections, the purpose of which is to save congressional time,[8] prohibit the reception and introduction in either House of private bills authorizing or directing the correction of a military or naval record (Section 131), and authorize the establishment of civilian boards within the several service departments for the correction of such records (Sec. 207, 5 U. S. C. 191a).[9] If it had been the understanding of Congress that the decisions of the Discharge Review Boards would be reviewed by the courts there would have been little ground to fear the introduction of an unusually large number of private bills, and even less reason to establish administrative boards with the power to grant relief despite the decisions of the Discharge Review Boards (41 Op. A. G. No. 1).[10]

2. Assuming, *arguendo,* that the decisions of the Discharge Review Boards are subject to judi-

[8] S. Rep. 1400, 79th Cong., 2d sess., p. 7.

[9] Section 207 was not included in the bill when it passed the Senate on June 10, 1946, one day prior to the approval of the Administrative Procedure Act. It was inserted subsequently by the House Committee. That section was amended by the Act of October 25, 1951, ch. 588, Public Law 220, 82d Cong., 1st Sess. in a way not relevant to the instant litigation.

[10] It may be that the Army Board on the Correction of Military Records to which have passed the prerogative powers of Congress to dispense clemency (40 Op. A. G. 504, 508; 41 Op. A. G. No. 1, p. 2; 41 Op. A. G. No. 8, p. 4) does have power to grant petitioner a type of relief which the Discharge Review Board could not give since the scope of ~~its~~ authority of such ~~Army~~ Board is limited to getting "at the truth of the matter" (cf. *Robertson* v. *Chambers*, 341 U. S. 37, 39).

cial review, we submit that this case does not warrant review by this Court, since the decision of the court below is clearly correct.[11]

Although this case was decided on a motion to dismiss, the record as designated by petitioner (R. 32) contains the report of a Commissioner appointed pursuant to Rule 29 of the Rules of the United States District Court for the District of Columbia (R. 8A–24A). This report is based not merely on the pleadings, but also on interrogatories, the answers thereto, exhibits, and the deposition of Dr. Wiemer, the physician who had examined petitioner prior to his discharge from the Army (R. 9A). Since petitioner chose to include in this record matters which were outside the pleadings, this Court may find it proper to consider them in connection with this petition, particularly since the trial court might properly have considered them had it treated the motion to dismiss as a motion for a summary judgment. See Rule 12 (b), Federal Rules of Civil Procedure.

The Commissioner's report discloses that there was substantial evidence before the Board to support the denial of the relief sought by peti-

[11] None of the cases cited by petitioner as being in conflict with the decision of the court below has any bearing on the narrow question presented in this case, *viz.*, whether Section 301 of the Servicemen's Readjustment Act of 1944 is a statute precluding review within the meaning of Section 10 of the Administrative Procedure Act.

tioner. Petitioner was inducted into the Army in May 1942, and his efficiency rating was excellent or very good until he absented himself without leave in September 1943 (R. 8A). When he surrendered a year later, the medical examination by Doctor Wiemer disclosed that petitioner was not then a psychotic, that he knew the difference between right and wrong, and that he was capable of forming the intent to desert (R. 11A–12A).[12] Petitioner was committed as being mentally ill in April 1946, i. e., 2½ years after he absented himself from the Army. In view of the medical report and the slowly progressing nature of petitioner's illness (Pet. 26) there was, we submit, ample evidence before the Army Discharge Review Board to support a finding that petitioner was capable of forming an intent to desert at the time he absented himself from the Army sometime in September 1943.

Looking to the pleadings alone, the bare allegations in the complaint that the action of defendant was arbitrary[13] and unjustified (pars. 16 and

---

[12] The very qualified concession of Doctor Wiemer that he possibly might have made a mistake was not before the Discharge Review Board. (Complaint, par. 15; R. 4A.) The failure to grant a second rehearing on the basis of this self-contradictory deposition (R. 13A–14A) cannot be considered an abuse of discretion.

[13] The allegation contained in paragraph 10 of the complaint (R. 3A) that petitioner was suffering from a mental illness when he absented himself from the Army without leave, is insufficient to sustain his conclusion that he was incapable of having an intent to desert.

17, R. 4A) and that the Discharge Review Board was not properly authorized and constituted (par. 18, R. 5A) do not state a cause of action. A general allegation to the effect that a Government official acted arbitrarily and unjustly is a mere legal conclusion and is not admitted by a motion to dismiss. *Silberschein* v. *United States,* 266 U. S. 221, 225. And the bare assertion that a governmental board was not properly authorized and constituted is subject to the same objection in view of the presumption of regularity which attaches to governmental action until the contrary is shown. *United States* v. *Chemical Foundation,* 272 U. S. 1, 14–15; *Inland Steel Co.* v. *National Labor Relations Board,* 105 F. 2d 246, 251–252 (C. A. 7).[14]

CONCLUSION

The decision of the court below is correct and does not warrant review. There is no conflict. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

HOLMES BALDRIDGE,
Assistant Attorney General.

SAMUEL D. SLADE,
HERMAN MARCUSE,
Attorneys.

FEBRUARY 1952.

[14] The detailed report of the Commissioner (R. 8A–24A) does not contain any reference to these alleged irregularities. Petitioner apparently has not even tried to elaborate on these stock charges.

APPENDIX

1. Sec. 301 of the Servicemen's Readjustment Act of 1944, 58 Stat. 286, as amended by the Acts of August 8, 1946, 60 Stat. 932, and July 26, 1947, Sec. 205, 61 Stat. 501, 38 U. S. C. 693h provides as follows:

> The Secretary of the Army and the Secretary of the Navy, after conference with the Administrator of Veterans' Affairs, are authorized and directed to establish in the Department of the Army and Navy Department, respectively, boards of review composed of five members each, whose duties shall be to review, on their own motion or upon the request of a former officer or enlisted man or woman or, if deceased, by the surviving spouse, next of kin, or legal representative, the type and nature of his discharge or dismissal, except a discharge or dismissal by reason of the sentence of a general court martial. Such review shall be based upon all available records of the service department relating to the person requesting such review, and such other evidence as may be presented by such person. Witnesses shall be permitted to present testimony either in person or by affidavit and the person requesting review shall be allowed to appear before such board in person or by counsel: *Provided,* That the term "counsel" as used in this section shall be construed to include, among others, accredited representatives of veterans' organizations recognized by the Veterans' Administration under section 200

of the Act of June 29, 1936 (Public Law Numbered 844, Seventy-fourth Congress). Such board shall have authority, except in the case of a discharge or dismissal by reason of the sentence of a general court martial, to change, correct, or modify any discharge or dismissal, and to issue a new discharge in accord with the facts presented to the board. The Articles of War and the Articles for the Government of the Navy are hereby amended to authorize the Secretary of the Army and the Secretary of the Navy to establish such boards of review, the findings thereof to be final subject only to review by the Secretary of the Army or the Secretary of the Navy, respectively: *Provided,* That no request for review by such board of a discharge or dismissal under the provisions of this section shall be valid unless filed within fifteen years after such discharge or dismissal or within fifteen years after the effective date of this Act [June 22, 1944] whichever be the later: *And provided further,* That the authority conferred upon the Secretary of the Army and the Secretary of the Navy by this section shall vest in and be exercised by the Secretary of the Treasury, at such times as the Coast Guard is operating under the Treasury Department, with respect to the discharge or dismissal of former personnel of the Coast Guard, and that the findings of boards established pursuant to such authority shall be final subject only to review by the Secretary of the Treasury.

2. Sec. 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. 1009, provides in pertinent part:

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

* * * * *

3. Army Regulations 615–366 dated October 21, 1944, provided in pertinent part:

Par. 8. * * *

b. *Statute of limitations not applicable.*—The commanding general of the service command, or other officer exercising general or special court-martial jurisdiction, may order the discharge without trial, because of desertion and physical unfitness, after return to military control, of an absentee or a deserter who is found physically unfit for service, and whose trial is not barred by the 39th Article of War.

(1) The term "physical unfitness" as used in this paragraph will be construed to include only—

(a) * * *

(b) Those cases of mental deficiency and constitutional psychopathy that obviously cannot be adapted to military service.

(2) Discharge will not be ordered under the provisions of this section if—

(a) * * *

(b) The enlisted man does not possess sufficient mentality to distinguish between right and wrong and is consequently incapable of forming the intent which is an

essential element of the offense of desertion. See AR 615–300.

Par. 10.

Form of discharge certificate to be given.—Discharge from the Army of the United States (blue) (WD AGO Form 56) will be used for all discharges under the provisions of this section.

U. S. GOVERNMENT PRINTING OFFICE: 1933